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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL No. 415 OF 2007

IN

WRIT PETITION No. 1672 OF 2004

- | | |
|--|---|
| 1. Dr. Ganesh T. Panse |) |
| 64, Sagandhalaya, Sion (E),) |) |
| Mumbai - 400 022. |) |
| |) |
| 2. Tata Memorial Hospitak Kamgar |) |
| Sangathana, C/o. Tata |) |
| Memorial Hospital Dr.F.Borges |) |
| Road, Parel, Mumbai 400 012) ... Appellants |) |

Vs.

- | | |
|------------------------------------|---|
| 1. The Memorial Hospital / |) |
| Tata Memorial Centre, |) |
| Dr. Ernest Borges Road, Parel |) |
| Mumbai - 400 012. |) |
| |) |
| 2. Dr. K. A. Dinshaw, Director) |) |
| Tata Memorial Hospital / |) |
| Tata Memorial Centre, Dr.) |) |
| Ernest Borges Road, Parel,) |) |
| Mumbai - 400 012.)... Respondents |) |

Mr. R. D. Bhat, Advocate for for Appellant.

Mr. S. K. Talsania, Sr. Advocate with S. D.
Uttam i/b M/s. Mulla & Mulla & CBC for
Respondents.

CORAM : R. M. S. KHANDEPARKAR
AND
D. G. KARNIK, JJ.

DATE : JUNE 18, 2007.

ORAL JUDGMENT [Per R. M. S. KHANDEPARKAR, J.]:-

. Heard. Present appeal arises from the

order dated 7/9 October 2006 passed in Writ
Petition No. 1672 of 2004. The learned Single
Judge dismissed the petition, which was filed by
the appellant against the order dated 5th April
2004 passed by the Industrial Court. The
learned Single Judge while holding that the
appellant had failed to establish that he was a
workman, within the meaning of Section 2(s) of
the Industrial Disputes Act 1947, and the
employee within the meaning of Section 3(5) of
the Maharashtra Recognition of Trade Unions and
Prevention of Unfair Labour Practices Act 1971
and that for the applicability of the
provisions of the Industrial Employment
(Standing Orders) Act 1946 the person concerned
has to be the workman under Section 2(s) of the
Industrial Dispute Act 1947 and that in the
absence of any evidence on the part of the
appellant, who had moved the Industrial Court,
he had failed to establish existence of the
relationship of the employee and the employer
which is the jurisdictional fact necessary to
be established in order to give jurisdiction
for the Industrial Court to entertain the
complaint under MRTU and PULP Act and

therefore, the petition has been dismissed.

2. Mere glance through paragraph 10 of the impugned order would suffice dismissal of the present appeal in limine. Paragraph 10 of the impugned order reads thus -

"The nature of the work that has been performed by the First Petitioner finds elaboration in the pleading which has been submitted before the Court in these proceedings under Article 226 of the Constitution. In the synopsis that is appended to the petition, the First Petitioner describes his background, qualifications and the nature of the work as follows:

. "The petitioner holds Ph.D. degree in Biochemistry from Mumbai University. He is a life member of Endocrine Society of India and also an active member of New York Academy of Sciences of

U.S.A. The petitioner No.1 has distinguished service in research having published several papers and was engaged in research relating to early detection of Human Esophagus cancer."

In para 2.1 of the petition the First Petitioner describes the nature of his duties and functions as follows:

"The petitioner holds degree from University of Bombay which he obtained in the year 1979 in Biochemistry at the age of 28 years. The petitioner No. 1 is life member of Endocrine Society of India from 1981. The petitioner joined TMC as Scientific Officer "SC" (Tumor Marker Laboratory). Right from the initial appointment the First Petitioner has been working as a Research Scientist except for a brief period between April, 1987 to August, 1991, when he was required to perform

routine clinical Biochemistry tests in Biochemistry lab. of TMC. Prior to joining TMC, the petitioner worked as Research Assistant in Institute of Research in Reproduction. Thus by virtue of his qualification, training, experience and aptitude the petitioner No.1 is not attuned to carry out routine technical work during the period 1987-91, hence, the petitioner was transferred to Immuno Biochemistry Laboratory to carry out research work in August, 1991. The petitioner No.1 has excellent record in research work having contributed several research papers which have been published in highly appreciated professional journals internationally. On 19-12-1994 the petitioner No.1 was elected as active member of New York Academy of Sciences of U.S.A. and continues to be so. The petitioner No.1's biographical sketch was published in globally recognized Marquis "who's who in the world" 14th

Ed. 1997. During the period from August 1991 to August, 2000 the petitioner No.1 carried out six research Projects and has to his credit five publications between 1st September 1991 to 31st August 2000. After his promotion as Scientific Officer (SD), the petitioner was carrying out research work in cancer related field viz: (1) Raising Monoclonal anti bodies (2) Radio Immuno Assay (RIA) for early detection of Human Esophagus cancer. The work related to first category involving mainly biology came to an end on 31-8-1998 on retirement of Dr. J.S. Nadkarni who was senior most scientist in the department. The 2nd research project was personally handled by the 1st petitioner. If this project was continued it would have led to earlier detection of cancer of esophagus which would have helped early treatment and cure to innumerable human beings suffering from Esophagus cancer which is in large number in India. The

project work itself was sanctioned by scientific Advisory Committee of TMC in May, 1994. Although the funds allocated were exhausted the petitioner carried out further research work on his own initiative by gathering material from various sources."

Ex-facie, the nature of the work which the First petitioner himself has stated that he was performing cannot be held to fulfill the description contained in Section 2(s). Section 2(s) requires that the person must be engaged to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. In **Adhyanthaya (supra)**, the Constitution Bench held that the expression "skilled" in the context in which it appears in Section 2(s) must "be construed as ejusdem generis and thus construed, would mean skilled work whether manual or non-manual which is of a genre of the other types of work

mentioned in the definition." Hence, the work of promotion of sales of a product or services of the establishment was held to be distinct from and independent of the types of work covered by the said definition. The contention that medical representatives were employed to do skilled work within the meaning of the said definition, was rejected. As regards the "technical" nature of the work, it has held to have been expressly rejected by the Court in the **Burmah Shell case.**

3. Perusal of the records disclose that in the complaint filed by the petitioner, it was stated in paragraph 3.1 and 3.2 as under-

"3.1 The complainant No.1 is a Research Scientist, having obtained Ph.D. degree from University of Bombay in Septembr, 1979 in Biochemistry at the age of 28 years. The complainant No.1 is life member of Endocrine

Society of India from 1981. Prior to joining the Hospital, the 1st complainant worked as Research Assistant in Institute of Research in Reproduction. The complainant No.1 joined the Hospital on 1-6-1983 as Scientific Officer "SC" (Tumor Maker Laboratory). Right from the initial appointment the first complainant has been working as a Research Scientist except for a brief period between April, 1987 to August, 1991 when he was required to perform routine clinical Biochemistry tests in Biochemistry lab, which is a separate section in Pathology department of the Hospital. By virtue of his qualification, training, experience and attitude the complainant No.1 is not attend to carry out routine technical work. Hence during the period 1987-91, two adverse remarks came to be mentioned in his confidential report, one in the year 1988 and second in the year 1989. The complainant No.1 however, did not

protest as the complainant No.1 was sure that he could excel as and when given research work. On 19-8-1991 the complainant No.1 was transferred to Immuno Biochemistry Laboratory i.e. once again to research work. Immediately thereafter the performance of the complainant No.1 improved substantially and he was promoted to Scientific Officer (SD) with effect from 1st February 1993 and his seniority in scientific cadre in the Tata Memorial Centre was maintained from 1-6-1993. Thus, from 19-8-91 to 31-8-2000, he was doing only research work. He was again transferred to routine work in Pathology Department of the Hospital and asked to do routine work by letter dated 23-11-2000.

3.2

The complainant

No

excellent record in research work having contributed several research papers which have been published in highly appreciated professional

journals internationally. List of papers published by the 1st complainant is at **Annexure-A** hereto. On 19-12-1994 the complainant No.1 was elected as the active member of New York Academy of Sciences of U.S.A. and continues to be so. There are very few Indians who are such members. The complainant No.1's biographical sketch was published in globally recognized Marquis "Who's who in the world" 14th Ed. 1997. Annexed hereto and marked as **Annexure-B** collectively is a copy of the said sketch along with Doctorate certificate and certificate of N.Y. Academy of Sciences. During the period from August 1991 to August 2000 the complainant No.1 carried out six research Projects and has to his credit five publications between 1st September 1991 to 31st August 1998/2000."

4. The respondents in their reply in paragraph 3 stated thus-

"3. It is further submitted that this complaint is not maintainable as the complainant is not a workman as defined under Industrial Disputes Act and therefore, not an employee as defined under the MRTU & PULP Act. The complainant has been working in a senior managerial/administrative capacity drawing a monthly salary of about Rs.24000/-. The designation of the complainant as Scientific Officer SD is in the Managerial administrative cadre in the scale of Rs.1000-325-15200. Therefore the complainant is not a workman as defined under the Industrial Disputes Act and so not an employee under the MRTU and PULP Act. The complainant has therefore no locus standi to file the present complaint. The complaint deserves to be dismissed. It is prayed that thus Honourable Court may be pleased to hold accordingly and to dismiss the complaint on this ground alone."

5. When the matter came up for hearing before the Industrial Court, the counsel for the parties submitted that the complaint itself may be disposed off on the basis of documents produced on record by the parties and thereby neither appellants nor the respondents produced any oral evidence. Our attention was drawn by the learned advocate appearing for the appellant to letter dated 23rd November 2000 while contending that the same apparently reveals that the appellant was the workman at the relevant time, though he was appointed as Scientific Officer. It is pertinent to note that the complaint was filed in the year 2004. Besides in the letter dated 23rd November 2000, it does not refer to all the duties which were required to be performed by the appellant. It merely refers to one of the program to which the appellant was required to attend to at the relevant time in the course of performing of duties. As against this, the averments in the complaint which are quoted above, as well as the observations made by the learned Single Judge in paragraph 10 of the impugned order

apparently disclose that the duties performed by the appellant and the nature of the work carried out by the appellant in the employment of the respondent, at the relevant time was nowhere of the nature of the work which a workman is required to carry out to satisfy the ingredients of Section 2(s) of the Industrial Disputes Act read with Section 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971. Considering the same, we find no infirmity in the impugned order which would warrant any interference in the appeal. The learned Single Judge taking into consideration the facts and circumstances of the case, while passing reasoned order has rejected the petition filed by the appellant. Taking into consideration the limited jurisdiction which the learned Single Judge can exercise against the orders passed by the Labour Court and Industrial Court, we find no case made out for interference.

6. Needless to say that the learned Single Judge while dismissing the petition has clearly

observed that the dismissal of the petition will not come in the way of the petitioner to seek such other remedies, as are available under the law for being pursued by the appellant. The right in that regard being well preserved in favour of the appellant, it is additional ground, which would justify rejection of the appeal in limine. In the result, appeal is dismissed with no order as to costs.

Sd/-

[D. G. KARNIK, J.] [R.M.S. KHANDEPARKAR, J.]

Sd/-